Case No. 81-6419

IN THE

SUPREME COURT OF THE UNITED STATES

MARK MIKENAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether a death sentence based in part upon a jury's recommendation of death violates due process and subjects the death sentenced defendant to cruel and unusual punishment when the jury which recommended the sentence by a seven to five vote heard and considered evidence of nonstatutory aggravating circumstances?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix. (A1-5)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on November 5, 1981. (A1-5) Petitioner filed a motion for rehearing which was denied on January 28, 1982. (A6-8) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141 Florida Statutes (1975) which is set forth in the appendix. (A17-19)

STATEMENT OF THE CASE

Petitioner, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida on November 3, 1975. (A10) During the robbery, Petitioner carried a revolver. (R253-254,294-295)(A10) There were no customers in the store, and the lone store clerk was forced into a back room. (TR253-255,294-296)(A10) From a hidden position inside a storeroom, an auxiliary deputy, Gary Barker, observed the robbery. (TR253-255)(A10) Startled by the arrival of a car at the front of the store, Petitioner and his companions attempted to leave through that rear storeroom. (TR255)(A10) Barker confronted the men, identified himself as a law enforcement officer and announced their arrest. (TR255-256)(A10)

At about the same time, Anthony Williams, an off-duty Tampa policeman wearing civilian clothes entered the front door of the store as a customer. (TR256)(A10) Barker advised Williams that a robbery was in progress and asked for help. (TR256)(A10) Petitioner then fired one shot above Barker's head. (TR257-258, 309)(A10) Barker returned one shot. (TR258)(A10) Petitioner and Vito Mikenas ran toward the front door. Barker fired again, killing Vito and wounding Petitioner. (TR258-260)(A10) As Petitioner fell near the front doorway, he fired a shot, killing Anthony Williams. (TR260-262)(A10)

On November 5, 1975, a grand jury indicted Petitioner for the first degree murder of Anthony Williams and the second degree murder of Vito Mikenas under a felony-murder theory. (R1-2) Petitioner pleaded guilty to the first degree murder charge and nolo contendere to the second degree murder, reserving for appeal the legal issue of whether he could be convicted for second degree felony murder. (R46-59) An advisory jury was impaneled pursuant to Section 921.141, Florida Statutes to render a recommendation on which penalty should be imposed for the first degree murder--death or life imprisonment. (TR14-200)

In addition to evidence concerning the circumstances of the crime, the sentencing advisory jury also heard other evidence in aggravation and mitigation. Over Petitioner's objections (R288-290,324,329), the prosecutor presented evidence of Petitioner's past criminal history including arrests and charges which did not result in convictions. (R339,340-344,345, 347,351,360-362,364,365,371-374,375,376) Police officers from Connecticut, New York and Florida testified to adult and juvenile charges against Petitioner for which there were no convictions; outstanding arrest warrants; and general suspicion regarding Petitioner's participation in an unsolved robbery. (ibid.) The prosecution argued all the evidence was relevant to the aggravating circumstance regarding previous conviction for a violent felony provided for in Florida's death penalty statute. §921. 141(5)(b), Fla.Stat. (1975) Petitioner contended that the only evidence admissible was for actual convictions of felonies involving violence. (TR288-290,324,329) In mitigation, a neurosurgeon testified that Petitioner would have had an uncontrollable reflex action at the time he was shot in the back by Officer Barker causing him to fire the shot which killed Williams. (TR404-414) The bullet fragments had entered the spinal canal, placing pressure on the spinal cord and causing a weakness in Petitioner's legs. (ibid.) Petitioner testified that he blacked out when shot and had no recall of firing the shot which killed Williams. (TR421-424)

The jury recommended a death sentence. (R67) Circuit Judge Robert W. Rawlins, Jr., adjudged Petitioner guilty of first degree murder and second degree murder. Petitioner was sentenced to death and life imprisonment. (R72-74) In his findings of fact to support the death sentence, which is required by Florida law, the sentencing judge, in aggravation, found: (1) that Petitioner committed the murder while engaged in a robbery; (2) that Petitioner committed the murder for pecuniary gain; (3)

that Petitioner had a previous conviction for robbery; (4) that the Petitioner created a great risk of death to many persons; (5) that Petitioner committed the murder to avoid arrest; and (6) that Petitioner had a substantial history of prior criminal activity. (R75-76)(A12-13) In mitigation, the sentencing judge found Petitioner's age of 22 years at the time of the crime. (R75-76)(A12)

Petitioner appealed to the Supreme Court of Florida. In a 1978 opinion reported at 367 So.2d 606, that Court remanded Petitioner's case for resentencing, without another advisory jury, because the sentencing judge improperly found a nonstatutory aggravating circumstance--that Petitioner had a substantial history of prior criminal activity. (A9-16) Mikenas v. State, 367 So.2d 606 (Fla.1978)

At his resentencing proceeding, Petitioner requested that a new sentencing advisory jury be impaneled, arguing that the jury which recommended death had, like the judge, considered the evidence of nonstatutory aggravating circumstances. The request was denied. (SR164-167,180-181) Petitioner had proffered an affidavit of a juror from the original proceeding which stated that the improper evidence was considered in aggravation by the jury and that without it, the seven to five vote for a death recommendation could have been different. (SR330)

Petitioner was again resentenced to death (SR184-191), and he appealed. One issue in the appeal was the failure of the trial court to impanel a new sentencing jury. In affirming the death sentence, the Supreme Court of Florida held that a new jury was not necessary because the evidence of Petitioner's criminal history was relevant to rebut the statutory mitigating circumstance of no significant history of prior criminal activity. Mikenas v. State, __So.2d__ (Fla.1981)(Case No. 49,928, opinion filed Nov. 5) On rehearing, Petitioner pointed to the

fact that the mitigating circumstance of no significant history of prior criminal activity was never an issue, and that the Supreme Court of Florida in an earlier decision held that such rebuttal evidence is improperly before a jury when the mitigating circumstance is not urged by a capital defendant. [Maggard v. State, 399 So.2d 973,977-978 (Fla.1981)]. (A6-7) The motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT

A DEATH SENTENCE BASED IN PART UPON A JURY'S RECOMMENDATION OF DEATH VIOLATES DUE PROCESS AND SUBJECTS THE DEATH SENTENCED DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT WHEN THE JURY WHICH RECOMMENDED THE SENTENCE BY A SEVEN TO FIVE VOTE HEARD AND CONSIDERED EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

Florida's capital sentencing procedures as defined in Section 921.141, Florida Statutes (A17-19) were designed to cure the unbridled discretion in capital sentencing which this Court condemned in Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court of Florida expressly acknowledged the new statutes purpose and deemed the limited, narrowly defined aggravating circumstances to be a critical part of the cure. State v. Dixon, 283 So.2d 1 (1973) In Proffitt v. Florida, 428 U.S. 242 (1976), this Court held that Florida's procedures were facially constitutional because they provided such specific and detailed guidance in the sentencing process. An important and indispensible part of the guidance this Court recognized in Florida's statute is the limitation of aggravating circumstances to those enumerated in the statute. Id.

The upholding of Petitioner's death sentence based upon a jury's recommendation of death which was founded in part upon evidence of nonstatutory aggravating circumstances is a gross misapplication of Florida's procedures. Florida has failed to comply with this Court's mandate that if it "...wishes

to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420,428 (1980) Although facially valid, the statutory procedures were misapplied in Petitioner's case rendering his death sentence unconstitutional. The jury's recommendation was not the product of a channeled and guided process because a nonstatutory aggravating circumstance was injected into the decision.

The prosecution in this case presented as aggravating circumstances, over Petitioner's objections, Petitioner's entire criminal history including outstanding charges for which there was no convictions, cases in which Petitioner was merely a suspect, as well as a prior felony conviction. (TR288-290, 324,329,340-345,347,351,360-362,364,365,371-374,375-376) Petitioner argued that much of this evidence failed to qualify as evidence of statutory aggravating circumstances and was improper. (TR288-290,324,329) However, the evidence was admitted, and the original sentencing judge relied on the evidence, finding as a nonstatutory aggravating circumstance that Petitioner had a significant prior history of criminal activity. (A9-16) Mikenas v. State, 367 So.2d 606 (Fla.1978) Additionally, the sentencing advisory jury also relied upon the evidence as aggravating circumstances in reaching its seven to five decision to recommend a death sentence. (SR330)

On Petitioner's first appeal to the Supreme Court of Florida, the appellate court realized that the sentencing judge relied on a nonstatutory aggravating circumstance and remanded the case for resentencing without a new jury. Id. Petitioner argued in the trial court and again on his second appeal that a new jury was necessary because, like the sentencing judge, it relied on improper, nonstatutory aggravating circumstances in reaching a sentence recommendation. (A1-5) Mikenas v. State,

__So.2d__ (Fla.1981)(Case No. 49,928, opinion filed Nov.5) The Supreme Court of Florida affirmed, holding that a new jury was not necessary because the evidence of Petitioner's criminal history, while improper aggravating evidence, was properly before the jury as evidence to rebut the mitigating circumstance of no significant history of prior criminal activity. Id. However, in reaching this decision, the Florida Court overlooked and failed to apply its earlier decision in Maggard v. State, 399 So.2d 973,977-978 (Fla.1981) where it held that such evidence is improper rebuttal where the defendant has not asserted or placed the mitigating circumstance of no significant criminal history in issue.[1/]

The fact that the jury in Florida's sentencing procedures only makes a recommendation to the judge who imposes sentence does not render the constitutional violation harmless. §921.141(2), Fla.Stat.; State v. Dixon, 283 So.2d 1 (Fla.1973) Both the sentencing trial judge and the Supreme Court of Florida are to give life recommendations great weight. A life recom-

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1/ Petitioner on rehearing, pointed to the Florida Supreme Court's oversight regarding Maggard v. State. (A6-7) In fact, the petition for rehearing quoted the following portions of the transcript where defense counsel indicated that the mitigating circumstance was not being asserted. (A6-7)

> I make a further objection as to the shoplifting charge, which is not a crime of violence, is not a capital-felony, and, therefore, according to the rules, should only be presented in rebuttal, should the defendant claim that he has no significant criminal history. Once a defendant makes that assertion that he has no significant criminal history then evidence of other crimes, crimes other than those of violence or other than capital-felonies, would be admissible to rebut. But until the predicate is laid by the defendant, or the claim is made by the defendant, that he has no prior criminal history, I do not think the evidence of a crime such as shoplifting is properly before the jury.

(TR289-290)

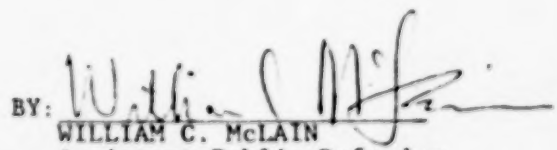
mendation can overridden only if the facts suggesting death as the appropriate penalty are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908,910 (Fla.1975) Consequently, the jury's recommendation was an important factor in determining Petitioner's sentence. And, with only one juror's vote making the difference between a life or death recommendation, it can hardly be said that the improper aggravating evidence made no difference.

Petitioner's death sentence was the product of a material misapplication of Florida's death penalty law. The jury recommendation was tainted by consideration of improper, non-statutory aggravating circumstances thereby destroying the reliability of the sentencing process. Petitioner's sentence is constitutionally infirm in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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